IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.224 OF 2007

Nectar Lifesciences Limited .. Petitioners.
Versus
Karvy Commtrade Limited .. Respondents.

Mr.Mahesh Jethmalani, Senior Advocate a/w.Mr.Atool Sood, Advocate i/b.Mr.Sandeep V.Marne, Advocate for petitioners.

Mr.N.H.Seervai, Senior Counsel with Mr.Shyam Mehta i/b.Mr.Satendra Kumar, Advocate for respondents.

Mr.Singh for Forward Markets Commission.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 29th October, 2007.

P.C.:

1. On 28th September, 2007, in this Arbitration Petition, I had passed an order referring to a Writ Petition being Writ Petition No.1538 of 2007. I was informed that there is an order passed in the above Writ Petition on 23rd August, 2007.

2. The reference to the said order was made because none disputed before me that the interim measures are sought on the ground that the penalty was levied by the Multi Commodities Exchange of India Limited. The penalty was levied in the sum of Rs.3,92,40,054.00. The facts in brief are that the petitioners opened a trading account with the respondents Karvy Commtrade Limited for commodities trading in the Client Code specifically

referred to in the Agreement. The trading was in Mentha Oil. The trading is done by placing orders online by clients. The Contract Notes were issued by the respondents.

3. The clients filled a form and got registered themselves as per the Agreement. The jurisdiction pertaining to disputes is of Courts at Mumbai and all contracts are deemed to be entered into at Mumbai.

4. There were certain limits fixed for trading as per the guidelines issued by the Forward Markets Commission. Reference is made to the said guidelines / circular. It is not necessary to refer to the same or reproduce the contents inasmuch as it is undisputed that a show cause notice was issued to the respondents by Forward Markets Commission for violation of the circular. There is an explanation submitted by the respondents to the said Commission. Ultimately, a hearing took place and it appears that on 23rd March, 2007, an order was made against the respondents, holding it guilty and directing it to pay penalty. In such circumstances, the respondents had issued notice to the clients calling upon them to deposit the amounts, failing which the respondent No.1 would suspend them from membership of Multi Commodities

Exchange of India Limited.

5. The petitioners also received a communication by fax stating therein that their account has been debited to the extent of Rs.3,92,40,054/- and the same is being transferred to the Multi Commodities Exchange of India Limited. Thus, the penalty amount was sought to be recovered by adjusting or appropriating petitioner's account with the respondent.

6. There is a dispute between the petitioners and the respondent inasmuch as the contention of the petitioners is that this is a trust fund. The respondent is not at all entitled to claim any sums from the petitioners or appropriate their account accordingly.

7. It is such dispute which was sought to be referred to Arbitration. The petitioners sought certain interim measures, principally restraining the 1st respondent from transferring the sums to the account of the concerned Exchange.

8. The Writ Petition, which is referred to in my earlier order was filed by one Sushil Kumar Ratanlalji Khowal, challenging the decision of the Exchange and Union

of India, imposing penalty upon him. That writ petition was placed before this Court and by the following order dated 23rd August, 2007, the same was disposed of.

> "Counsel appearing for respondent Nos.1 and 2 submits that the Department has decided to withdraw the order imposing penalty upon the petitioner. However, they reserve their right to proceed in accordance with law and pass appropriate order on the basis of the show cause notice already issued to the petitioner after hearing the petitioner as may be permissible to them in accordance with law. In view of the above statement made on behalf of respondent Nos.1 and 2, it is obvious that the order passed by respondent No.3 does not stand. In view of the statement made on behalf of respondent Nos.1 and 2 and the circumstances above noticed, the petition becomes infructuous and is accordingly disposed of. The parties will abide by the directions contained in the order.

There shall be no order as to costs."

9. Learned counsel appearing before me state that this order is passed because the respondents to this writ petition could not satisfy the Court prima-facie that they have any power to recover such penalty and pass an order in that behalf.

10. The respondent before me has challenged the order of the Exchange, imposing penalty in a Writ Petition bearing No.10093 of 2007 before the Andhra Pradesh High Court. The writ petition was placed before the Court and it appears that some interim orders have been passed.

11. It is in these circumstances, on 28th September, 2007, I directed to issue notice to both Exchanges.

12. In pursuance to the notice, both exchanges have appeared before me. Mr.Seervai, learned Senior Counsel appears for respondent, who is the petitioner before the Andhra Pradesh High Court, whereas Mr.Singh appears for Forward Markets Commission. The Multi Commodities Exchange of India Limited has been duly served. Both sides do not dispute before me that the action is initiated mainly by Forward Markets Commission purportedly

under the Forward Contracts (Regulation) Act, 1952. In the light of the order passed by this Court on 23rd August, 2007, in my view, the present petition can be disposed of. Once the Forward Markets Commission itself could not satisfy this Court in similar facts and circumstances with regard to the source of its powers to impose penalty and recover the amounts, then, it is futile for the petitioner and the respondent to go for any arbitration. Once the Forward Markets Commission itself cannot proceed in furtherance of its order as is clear from the fact-situation, then, there is no question of the respondent recovering or adjusting or appropriating any sums of penalty much less to the tune of Rs.3,92,40,054/- as stated in the petition.

13. In such circumstances, there is no question of the respondent, recovering any sums by acting upon its communication issued to the petitioner on 27th April, 2007. This communication was in furtherance of the action of the Forward Markets Commission. It cannot be acted upon any longer. The arbitration petition can be disposed of in terms of the order passed by the Division Bench. The Forward Markets Commission’s communication to the petitioner dated 27th April, 2007, show cause notice and the order made in furtherance thereon on 23rd March, 2007

does not survive. The said order cannot be acted upon in the light of the statement made before this Court, once the penalty proceedings are withdrawn against the petitioner in writ petition No.1538 of 2007 and the respondent before me is identically placed that the same order, accrues to the benefit of the respondents and the present petitioner as well. The Forward Markets Commission, however is at liberty to initiate fresh proceedings in terms of the Division Bench order. As and when they are initiated, it would be open for the petitioner to file a fresh petition and invoke the provisions of Section 9 or 17 of the Arbitration and Conciliation Act, 1996. Accordingly, reserving all rights and contentions of both sides in that behalf, the present petition is disposed of.

14. A copy of the order dated 23rd August, 2007, passed in Writ Petition No.1538 of 2007 is taken on record and marked "X" for identification. Mr.Seervai, learned Senior Counsel, on instructions, states that in the light of the dismissal of the arbitration petition, the respondent shall return the amount of Rs.3,92,40,054/- to the petitioner within a period of two weeks from today. He makes a further statement that the respondent i.e. the petitioner before the Andhra Pradesh High Court shall take

steps to withdraw the writ petition filed before the Andhra Pradesh High Court accordingly.

15. Arbitration petition is disposed of in the above terms. No costs.

(S.C.Dharmadhikari, J.)